MAEDER

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Material Handling, Inc.

File: B-252968; B-253205

Date: August 10, 1993

A. Sid Goss for the protester.
Donald M. Pettit, Esq., Defense Logistics Agency, for the agency.
Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Company may not change an offer submitted in its own name after the closing date to make itself only the agent of another company since award to an entity other than that named in the original offer is improper.

DECISION

American Material Handling, Inc. protests the rejection of its low-priced proposals, which it asserts it submitted as an agent for Professional Material Handling Co., Inc. (PMH) under request for proposals (RFP) No. DLA730-92-R-7066 (No. 7066) and for Prime Mover Corporation, Komatsu U.S.A. and Clarklift of Atlanta under RFP No. DLA730-93-R-7072 (No. 7072), both issued by the Defense Construction Supply Center (DCSC) for stock handling equipment. DCSC rejected both proposals because it determined that American is not a "regular dealer" under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1988) and improperly submitted the proposals in its own name. American contends that its listing itself as the offeror and its incorrect representations were clerical errors which it should be permitted to correct.

We deny the protests.

In its offer submitted under RFP No. 7066, American identified itself as the offeror and its president signed the proposal. In addition, American made a negative contingent fee representation and represented that it was a "regular dealer" under the Walsh-Healey Act. That Act requires that all contracts for the manufacture or furnishing of materials, supplies, articles, and equipment, in any amount exceeding $10,000, shall be with manufacturers

or regular dealers. The agency found that American did not qualify as a regular dealer under Federal Acquisition Regulation (FAR) § 22.606-2 and was ineligible for award.[1]

After American was advised that it did not qualify as a regular dealer, American attempted to change its offer to indicate that it was an agent for PMH. American submitted a letter from PMH, dated January 8, 1993, stating that American was its "authorized manufacturer's agent."

As noted above, however, American submitted the offer in its own name and its president signed the proposal. Also, American did not identify itself as an agent and did not identify a principal. DCSC determined that American could not amend its offer to act as an agent for PMH and notified the protester of this determination. In spite of this notification, American submitted a completed standard form (SF) 119, "Statement of Contingent or Other Fees," in a further attempt to qualify as an agent for PMH.

In subsequent letters, DCSC informed American that if American wanted to represent a contractor as an agent, it must contract in the name of the principal, disclose its agency relationship, make the appropriate representation in the RFP's contingent fee provision and submit SF 119. DCSC reiterated that American's offer could not be changed to an offer from PMH, with American acting as PMH's agent.

American protested to the agency the contracting officer's decision not to permit American to change its status to that of an agent of PMH. The protest was denied and American protested to our Office.

The facts under RFP No. 7072 are similar. However, RFP No. 7072 was amended five times after the closing date and, although American identified itself as the offeror in its original proposal, made a negative contingent fee representation and represented that it was a regular dealer under the Walsh-Healey Act, in its acknowledgment of amendment 005 American wrote in the margin that it was the

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[1]In order to qualify as a regular dealer under FAR § 22.606-2, an offeror must, among other things, have an establishment or leased space in which it regularly maintains a stock of supplies, the stock of supplies must be a true inventory from which sales are made, and the supplies stocked must be of the same general character as those to be supplied under the contract. Here, DCSC found that American does not maintain an inventory of any type. Rather, items sold by American are shipped from the manufacturer to the customer.

"authorized agent" for three firms: (1) Komatsu, U.S.A., (2) Prime Mover Corporation; and (3) Clarklift of Atlanta. American still listed itself as the contractor and its president signed the amendment as the "contractor/offeror."

After acknowledging amendment 005, American submitted two letters to DCSC stating that American was not a regular dealer under the Walsh-Healey Act, but was "the authorized agent" for Prime Mover, Komatsu U.S.A. and Clarklift. American also submitted a corrected contingent fee representation section and indicated that it would furnish SF 119, if appropriate.

DCSC notified American that its offer as an agent for the three manufacturers would not be considered for award since no offers had been submitted by those three firms prior to the original closing date. Again, American filed an agency-level protest, which was denied and American protested to our Office.

American concedes that it is not a regular dealer under the Walsh-Healey Act, but argues that it was an agent for PMH, Prime Mover, Komatsu U.S.A. and Clarklift. According to American, since the solicitations here are RFPs, it should be permitted to demonstrate after the original closing date for receipt of proposals that it is an authorized agent for each of its principals. Alternatively, American contends that under FAR § 3.405(b)(2), which permits waiver of the failure to complete the contingent fee representations as a minor informality, it should be allowed to modify the representations in its proposals and change its status to that of an agent.

We find that DCSC properly rejected American's attempts to change its status after the date set for receipt of proposals. FAR § 22.607 provides that a manufacturer or regular dealer may bid, negotiate, and contract through an authorized agent only if the agency is disclosed and the agent acts and contracts in the name of the principal. American did not identify itself as an agent in its offers and listed itself as the offeror in both offer.[2]

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[2]American nonetheless argues that FAR § 22.607 is contradicted by FAR § 3.408-2(c)(4). FAR § 3.408-2(c)(4), which is one of five guidelines intended to assist contracting officers in determining whether an agency is a "bona fide" agency as defined in FAR § 3.401, states in relevant part: "The business of the agency should be conducted in the agency name and characterized by the customary indicia of the conduct of regular business." We see no contradiction. FAR § 3.408-2(c)(4) does not permit

(continued...)

Although American argues that it should be permitted to correct the representations in its proposals as minor informalities under FAR § 3.405(b)(2), essentially what American seeks is the opportunity to submit a new offer, substituting its principals for itself as offerors and manufacturers. However, an award to an entity other than that named in the original offer is improper; substitution of one firm for another that has submitted an offer is not allowed because of the need to avoid offers from irresponsible parties whose offers could be avoided or ratified by the real principals as their interests might dictate. KB Indus.--Recon., B-244120.2, June 14, 1991, 91-1 CPD ¶ 570; Worldwide Parts, Inc., B-244793, Aug. 15, 1991, 91-2 CPD ¶ 156. Thus, allowing American to make such a change would result in an improper substitution of firms. In short, once American submitted offers in its own name, it could not change the offers after the closing date to substitute another entity as the real party in interest.

Accordingly, the protests are denied.

for James F. Hinchman
General Counsel

[2](...continued)
an agent to contract for the principal in its own name but simply states that an agent should conduct its own business--as opposed to the principal's business--in its name.